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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TROY SMITH, Defendant and Appellant.	B235091 (Los Angeles County Super. Ct. No. TA116942)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kelvin D. Filer, Judge. Reversed in part, affirmed in part and modified.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, James William Bilderback II and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of Section 3 of the Factual and Procedural Background and Sections 1 & 3 of the Discussion.

The trial court convicted Troy Smith (defendant) of five counts of indecent exposure stemming from three separate incidents involving two different groups of witnesses. In the third incident, defendant exposed himself while standing outside a residential window. The occupants of the residence observed defendant exposing himself, and closed the curtain on the window. Re-opening the curtain, they again saw defendant exposing himself. For this conduct, defendant was convicted of two counts of indecent exposure. We conclude there was a single exposure only and reverse one of defendant's convictions. In the unpublished portions of this opinion, we reject defendant's contention of *Marsden*[1] error, and accept his argument that his conduct credits were miscalculated. We reverse the conviction of a single count, modify the conduct credits, and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Incidents*

a. *January 13, 2011 (Counts 1 and 2)*

On January 13, 2011, seventeen-year-old Karen M.[2] went to throw away trash in a dumpster in the alley behind her apartment. Karen M. noticed defendant by the dumpster, felt uncomfortable, and asked her thirteen-year-old friend, Michelle R., to accompany her. As they approached the dumpster, defendant exposed his penis and began masturbating. Michelle R.'s cousin, Victor F., was visiting and approached the

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[1] In a *Marsden* motion, a defendant requests the judge to appoint new counsel because he or she believes that current counsel is providing ineffective assistance. (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).)

[2] To preserve anonymity, we do not identify minor witnesses by their last names.

girls by the dumpster. As he approached, defendant pulled up his pants and walked away. Victor F. temporarily left and Michelle R.'s mother and grandmother arrived at the scene. Defendant returned and recommenced masturbating. When Victor F. returned, defendant left on a bicycle.

b. *February 22, 2011 (Count 3)*

Karen M. was playing basketball with her friend, Gabriela V. and Gabriela V.'s cousin, behind Karen M.'s apartment on February 22, 2011. Defendant stood on the other side of a fence in the alley[3] and proceeded to expose his penis and masturbate. From inside the apartment, Gabriela's father heard a commotion and took several photographs of defendant, one of which depicted defendant holding his penis.

c. *February 24, 2011 (Counts 4 and 5)*

On February 24, 2011, 0.2 miles from the location of the previous two incidents, Maria Hernandez heard a noise outside her living room window and saw defendant masturbating in her backyard. She closed the curtain. Her sixteen-year-old daughter, Abilenne C., entered the room, opened the curtain, saw defendant masturbating, and closed the curtain. Hernandez's other daughter, Yara C. also saw defendant masturbating. It was alleged that the two indecent exposure counts were separated by the opening and closing of the curtain, which gave defendant an opportunity to reconsider his conduct and desist.

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[3] It is unclear how close defendant was to the location in counts 1 and 2.

2. *The Charges*

Defendant was charged by information with five counts of indecent exposure with a prior conviction (Pen. Code, § 314, subd. (1).)[4] It was further alleged that defendant suffered two prior serious felony convictions within the meaning of the "Three Strikes Law" (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and served four prior prison terms (§ 667.5, subd. (b)).

3. *The Marsden Motions*

During the March 14, 2011 preliminary hearing, defendant pulled his shirt over his head and rested his head on his counsel's table. When Judge Daigh ordered him to sit up and take the shirt off his head, defendant refused and demanded a live lineup. The court called for a recess in order for Deputy Public Defender Joe Burghardt to speak with his client so that the hearing could proceed. Once the hearing resumed, Attorney Burghardt informed the court that defendant wanted a new attorney or he otherwise would not return to the courtroom. The court stopped the hearing and asked the deputy district attorney to leave the courtroom so that it could address the *Marsden* motion.

The court asked defendant why he wanted a new attorney and defendant responded that his counsel: did not have a defense prepared; failed to call witnesses at the hearing; did not request a live lineup; and had only met with defendant via video. Attorney Burghardt explained that he rarely presents a defense or calls witnesses during a preliminary hearing and did not feel a live lineup was prudent because several

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[4] Unless otherwise indicated, all further statutory references are to the Penal Code.

witnesses had previously identified defendant from photographs. The *Marsden* motion was denied.

Before jury selection, defendant renewed his *Marsden* motion on May 26, 2011, claiming that his lawyer failed to turn over certain discovery to him[5] and, refused to file a *Pitchess* motion.[6] Defendant also asserted that he and his lawyer's "communication skills broke down." Attorney Burghardt explained that he thought a *Pitchess* motion would be frivolous because the arresting officer was not a witness to the crimes. While Attorney Burghardt admitted that communication with defendant was strained, he declared that he was still willing and able to continue representing defendant. Judge Filer[7] denied the *Marsden* motion.

The following day, after jury selection began, defendant made another *Marsden* motion. He complained that his counsel had not told him about two witnesses his counsel had mentioned during jury selection and reiterated that he had never received certain discovery. Attorney Burghardt explained that the two witnesses were police officers and that he did not intend to call them unless testimony elicited at trial differed from their written reports. With respect to defendant's discovery concern, Attorney Burghardt explained that he had gone over witness transcripts orally with defendant and provided him with copies of some of the transcripts, but he now understood that

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[5] Neither counsel nor the court addressed the discovery challenge at this hearing.

[6] A *Pitchess* motion is a request for police personnel files when the defendant alleges that an officer used excessive force or lied about the events surrounding the defendant's arrest. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).)

[7] Judge Filer heard the latter three *Marsden* motions.

defendant wanted copies of "all police reports and everything else." He indicated that he was in the process of redacting the remaining discovery and promised to provide defendant with the redacted files by the next court date.[8] The court again denied defendant's motion, concluding that communication had not broken down to the point where Attorney Burghardt could no longer represent defendant. Defendant stated that he refused to reenter the courtroom while Attorney Burghardt continued to represent him. The court encouraged defendant to return but noted that the court would proceed without defendant in attendance if he refused to come out. After he refused to return to the courtroom, the court found that defendant voluntarily waived his right to be present for his trial, but left open the option for defendant to return if he wished.

At the next court appearance, on May 31, 2011, defendant returned to the courtroom and made a fourth *Marsden* motion. Defendant claimed that the discovery he received from Attorney Burghardt revealed that a new victim was going to testify against him regarding the third count, and that had he known this information, he "probably would have" accepted the prosecution's plea offer.[9] The court nonetheless promised to take defendant's "willingness" to accept the plea into consideration for sentencing purposes. The *Marsden* motion was denied.

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[8] Attorney Burghardt did, in fact, provide this information to defendant by the next court date.

[9] The court noted that the prosecution had offered 14 years and 4 months in an offer that had expired, and defendant makes no argument on appeal representing that he would have accepted the deal.

4. *The Trial*

The case proceeded to jury trial. Karen M., Michelle R. and Victor F. testified to the acts in Counts 1-3. Maria Hernandez, Yara C., and Abilenne C. testified to the acts in Counts 4 and 5.

In defense, defendant's sister testified that defendant was present at her house on February 24 (Counts 4 and 5), having watched television with his nephew all morning. Defendant testified that he lived with his sister and that he was at his sister's home on the dates and times alleged in counts 1, 2, 4, and 5. He admitted to his presence in the alley on February 22 (Count 3) but testified that he was urinating and not masturbating.

5. *Conviction and Sentencing*

The jury found defendant guilty on all five counts. In a bifurcated trial, it found the allegations of two serious felony convictions, four prior prison terms, and a prior indecent exposure conviction true. Before sentencing, defendant filed a brief arguing that one count from counts 1 and 2 and one from counts 4 and 5 should be stayed pursuant to section 654. The trial court rejected defendant's argument. The trial court struck one of the prior serious felony convictions in the interests of justice. Defendant was sentenced to a total of fifteen years, four months in prison. This was calculated as follows: the upper term of three years, doubled to six years on count 1, and on counts 2-5, consecutive sixteen month terms. The court imposed an additional year for each of defendant's four prior prison terms pursuant to Penal Code section 667.5, subdivision (b). The court imposed various fines and fees on defendant, and awarded

him a total of 199 days[10] of presentence custody credits. Defendant filed a timely notice of appeal.

ISSUES ON APPEAL

Defendant raises three issues on appeal. First he contends that the denial of his *Marsden* motions constituted a denial of his Sixth Amendment right to counsel. Second, he contends that he cannot be properly convicted of two counts for the single exposure on February 24.[11] Third, he contends that because these crimes were nonviolent, he is entitled to a total of 248 days of presentence credit.

DISCUSSION

1. *The Trial Court's Denial of the Marsden Motions Was Not An Abuse of Discretion*

Criminal defendants are entitled to competent representation. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *People v. Smith* (1993) 6 Cal.4th 684, 690 (*Smith*).) Defendants who believe that their Sixth Amendment right to counsel is being denied because they are receiving inadequate representation may file a *Marsden* motion to correct this deficiency. (*Ibid*.) A trial court must permit a defendant a chance to explain his or her contention of inadequate representation. (*People v. Taylor* (2010) 48 Cal.4th 574, 599.)

It is within the trial court's discretion to determine whether a defendant may discharge his appointed counsel and substitute another attorney. (*Marsden, supra,*

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[10] This consisted of 166 actual days plus 33 days local conduct credit.

[11] Defendant initially argued that punishment for both counts violated section 654. We sought additional briefing on whether defendant could be convicted of both counts.

2 Cal.3d at p. 123.) A defendant's right to counsel does not require the court to appoint new counsel unless the first attorney is not adequately representing the accused or the "defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result." (*Taylor*, *supra*, 48 Cal.4th at p. 599.) We review the trial court's denial of a *Marsden* motion for abuse of discretion. (*Taylor*, *supra*, 48 Cal.4th at p. 599.) "[T]actical disagreements between a defendant and his attorney or a defendant's frustration with counsel are not sufficient cause for substitution of counsel. [Citations.]" (*People v. Streeter* (2012) 54 Cal.4th 205, 231.) There is no abuse of discretion for denial of the motion " 'unless the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to assistance of counsel.' " (*Taylor*, *supra*, 48 Cal.4th at p. 599.)

We conclude that the trial court did not abuse its discretion in denying the *Marsden* motions. As we shall discuss, most of the problems defendant had with his counsel relate to tactical decisions, which belong to his attorney to make. The other issues raised by defendant relate to insufficient communication. However, the record reflects that Attorney Burghardt adequately communicated with defendant. We will now address each specific issue defendant raised in his *Marsden* motions.

In his March 14 motion, defendant argued he was receiving ineffective representation because his counsel did not request a live lineup, did not have a defense prepared, failed to call witnesses at the preliminary hearing, and only met defendant via video. The first three contentions were strategic decisions for Attorney Burghardt, and not defendant, to make. As to the fourth contention, defendant has no authority for the

proposition that he could not effectively communicate with his counsel through video conferencing and, in any event, counsel thereafter met with defendant in person on numerous occasions.

In his May 26 motion, defendant complained that he did not receive certain discovery and that his counsel did not file a *Pitchess* motion. Although the discovery issue was not discussed at this time, it was resolved at the next hearing. As to the *Pitchess* motion, Attorney Burghardt explained that a *Pitchess* motion would have been frivolous because the police officer in question was not a witness to the charged offenses; this was not erroneous.

Defendant renewed his motion the following day, arguing that he was unprepared for trial because his counsel did not tell him about two additional witnesses that his counsel had mentioned during jury selection, and he again raised the discovery issue. Attorney Burghardt explained that he did not intend to call those witnesses unless testimony at trial differed from their reports; the witnesses, in fact, did not testify. While he admitted to misunderstanding defendant's discovery concerns, Attorney Burghardt promised to provide the discovery by the next court date, which he did. A misunderstanding does not equate to ineffective representation, especially when it is corrected quickly.

In his fourth motion, defendant claimed he became aware of new information from the discovery, and had he known, he may have accepted the prosecution's expired plea offer. Defendant never explicitly stated that he would have accepted the offer, but

the court nonetheless promised to take defendant's apparent willingness to do so into consideration during sentencing.

We agree with the trial court's repeated determinations that ineffective representation was not likely to result from any difficulty in communication between defendant and his counsel. While Attorney Burghardt conceded that communication was strained, he did not believe that communication had deteriorated to the point where he could not provide effective representation. We agree with both judges who concluded that there was no irreconcilable conflict and no likelihood of ineffective representation. Much of the breakdown in communication can be attributed to defendant's actions, such as interrupting proceedings and refusing to return to the courtroom unless he received new counsel, but defendant may not through his own actions manufacture a conflict with his counsel in an attempt to force the court to appoint substitute counsel. (See *Smith, supra,* 6 Cal.4th at p. 697 [declaring that a defendant may not substitute counsel because of a conflict originating from defendant's own conduct].) Based upon Attorney Burghardt's representations and the trial court's own observations that communication had not broken down to the point where Attorney Burghardt could not effectively represent defendant, the court did not abuse its discretion in denying the *Marsden* motions.

2. *Defendant Was Improperly Convicted of Two Counts for the February 24 Incident*

The California Constitution provides that no person may be put in jeopardy twice for the same offense. (Cal. Const. Art. I, § 15.) Multiple convictions can be based on

a single criminal act, if the charges allege separate offenses. (*People v. Coyle* (2009) 178 Cal.App.4th 209, 217.) The issue of whether one continuous act of indecent exposure can sustain multiple convictions when consecutive victims witnessed the same exposure over an uninterrupted period is one of first impression in California. We first look at the language of our indecent exposure statute. Second, we turn to cases in other jurisdictions which have considered the issue.

California's indecent exposure statute provides that any person who willfully and lewdly "[e]xposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby," is guilty of indecent exposure. (§ 314(1).) The language of the statute prohibits the *exposure* itself and not the specific exposure to a person. In fact, the number of observers is not an element of the offense. (See *People v. Carbajal* (2003) 114 Cal.App.4th 978, 986 (*Carbajal*) [holding that visual observation of the offense is not required to support an indecent exposure conviction].) Thus, since defendants can violate the statute by exposing themselves in a public forum where no witnesses *actually* see the defendants' genitalia, something other than the number of observers must determine where one act of indecent exposure ends and another begins. Because neither party has cited to, nor has independent research disclosed, any California authority addressing this issue, we may look to other jurisdictions for guidance. (*Id*. at pp. 208-211.)

The state of Washington has a similar indecent exposure statute to California. Its statute states that "[a] person is guilty of indecent exposure if he or she intentionally

makes any open and obscene exposure of his or her person . . . knowing that such conduct is likely to cause reasonable affront or alarm." (Washington Criminal Code RCWA 9A.88.010(1).) Like the California statute, there is no mention of the number of observers.

In *State v. Vars* (Wash.Ct.App.2010) 237 P.3d 378 (*Vars*), the court focused on the act of exposure as the gravamen of the offense in interpreting the Washington statute to provide that a single act of indecent exposure is committed regardless of the number of observers. (*Id.* at p. 386.) There, the defendant undressed and walked around naked for a period of hours without covering himself in between observations. (*Id.* at p. 387.) He was convicted of two counts of indecent exposure, but one count was reversed on appeal because his conviction of the two counts violated the prohibition against double jeopardy. (*Ibid.*; see also *Harris v. State* (Tex.Crim.App. 2011) 359 S.W.3d 625 [declaring the act of exposure as the unit of prosecution and reversing two of three convictions after defendant exposed himself to three children simultaneously]; *Com. v. Botev* (Mass.App.Ct. 2011) 945 N.E.2d 956 [holding that two convictions for open and gross lewdness arising from a single act witnessed by multiple victims violated the prohibition against double jeopardy]; *Com. v. Laudadio* (Pa.Super.Ct. 2007) 938 A.2d 1055 [vacating one of two convictions of open lewdness and holding that the offense precludes multiple punishments when multiple witnesses observe the same act]; *Ebeling v. State* (Nev.2004) 91 P.3d 599 [reversing one of two convictions of indecent exposure when defendant exposed himself to two victims at the same time]; but cf. *State v. Fusco* (N.C.Ct.App.1999) 523 S.E.2d 741 [affirming two indecent exposure convictions when

defendant was observed by multiple witnesses simultaneously, but not considering whether this violated double jeopardy.) We agree with the Washington, Texas, Massachusetts, Pennsylvania, and Nevada courts that the gravamen of indecent exposure is the exposure and not the number of observers.

The prosecution argues that *Vars* conflicts with California principles of criminal law in that the crime in Washington is against morality rather than against victims. However, as previously discussed, our indecent exposure statute is very similar to that of Washington in that both statutes can be violated by an exposure occurring in a public place. Requiring that the act occur in an open area suggests that the crime does not require specific victims. This is further supported by the fact that visual observation of the genitals is not an element of indecent exposure in California. (*Carbajal*, *supra*, 114 Cal.App.4th at p. 986.)

The prosecution further argues that the closing and opening of the window curtain by Maria Hernandez and her daughter, on February 24, 2011, resulted in a break between each act of exposure and thus defendant was properly charged with separate indecent exposure offenses. We disagree. While there may have been a break between *observations* of defendant, there is no evidence that he ever pulled up his pants or stopped masturbating.[12] In fact, when the curtain closed and opened, defendant was still exposed in the same spot; the only intervening act was by the observers.

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[12] In contrast, defendant was properly convicted of counts 1 and 2 because he pulled up his pants and walked away between the two acts of exposure.

A course of conduct, which is divisible in time where the offenses are temporally separated as to afford a defendant an opportunity to reflect and renew his or her criminal intent before committing the next offense, may give rise to multiple violations of the law. (*People v. Clair* (2011) 197 Cal.App.4th 949, 960.) The prosecution argues that defendant had an opportunity to reflect when the curtain closed. However, there was no temporal separation between the offenses because the record reflects that defendant continued masturbating throughout the entire incident. To find that defendant had an opportunity to reflect, we would have to accept that a defendant has sufficient ability to reflect while still committing the initial act. We refuse to draw this conclusion. To do so would allow a trespasser to be charged in separate counts for each step taken during a trespass, or a possessor of controlled substances to be charged in separate counts for each minute of possession. As a legal proposition, defendant had no more time to reflect on his conduct than any other defendant whose crime takes place in more than one moment.

The prosecution attempts to analogize the present case to *People v. Harrison* (1989) 48 Cal.3d 321 where three undisputed sexual penetrations led to three separate convictions. There, the defendant unsuccessfully argued that since all penetrations were close in time and subject to the same intent, they should only be considered to constitute one offense, despite the plain language of the statute prohibiting forcible sexual penetrations. Here, the plain language of the statute talks in terms of exposures, so there is no statutory basis for charging separate violations based on the number of viewings.

This case more closely parallels *Vars* because both defendants exposed themselves to multiple people over a continuous period of time.

Because it is the exposure that is the gravamen of the offense, we conclude that defendant only indecently exposed himself once on February 24, 2011. We reverse his count 5 conviction and modify his sentence to strike one of the consecutive sixteen-month terms.

3. *Defendant Is Entitled to an Additional 49 Days of Local Conduct Credit*

Defendant argues, the prosecution concedes, and we agree that defendant is entitled to 82 days of conduct credit instead of the 33 awarded. (§ 4019.) Defendant is entitled to a total of 248 days of presentence credit. We will modify the judgment accordingly.

DISPOSITION

Defendant's count 5 conviction is reversed and he is entitled to an additional 49 days of local conduct credit. Defendant's sentence is modified to delete the consecutive 16-month term attributable to count 5, and to award an additional 49 days of local conduct credit. As so modified, the judgment is affirmed.

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CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.